Petition

81-1868

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COUNCIL OF PUBLIC UTILITY MAILERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In 1979 the Governors of the Postal Service adopted the Postal Rate Commission's recommendation, made pursuant to a rulemaking proceeding, establishing a Domestic Mail Classification Schedule which defined Presorted First Class Mail as a "subclass". In the instant case, the Commission prescribed rates for presorted mail on the basis that it was a "rate category" and was not a "subclass" entitled to rate determination pursuant to the standards of 39 U.S.C. §3622(b).

The questions presented are:

Was it error for the Court of Appeals to approve the Commission's decision which:

(a) Did not acknowledge the existence of the Domestic Mail Classification Schedule established in 1979?

(b) Placed the burden of proof on Petitioner to justify the status established in that schedule?

(c) Held that Petitioner had not justified modification of an interpretive ruling issued in a 1978 rate case, based on a prior classification schedule, which had been published in 1976 and superseded by the 1979 schedule?

PARTIES TO PROCEEDING BELOW

In addition to the United States Postal Service the following were parties in the Second Circuit proceeding to which this petition for certiorari is directed:

Newsweek, Inc.
Time, Inc.
International Labor Press Association
Warshawsky and Company
Classroom Publishers Association
March of Dimes
American Business Press, Inc.
Association of American Publishers, Inc.
The Recording Industry of America
Magazine Publishers Association, Inc.
Mail Order Association of America
Parcel Shippers Association
Reader's Digest Association, Inc.
Dow Jones & Company, Inc.
Direct Mail/Marketing Association, Inc.
Council of Public Utility Mailers
United Parcel Service of America, Inc.
National Association of Greeting Card Publishers

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Council of Public Utility Mailers
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v.

United States Postal Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Council of Public Utility Mailers (CPUM), prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in *Newsweek, Inc. v. United States Postal Service,* Nos. 81-4035, et al., on November 2, 1981, and the denial of CPUM's Petition for Rehearing on January 11, 1982. This Petition requests review of that portion of the Court's decision approving the Postal Rate Commission's treatment of Presorted First Class Mail; this is a matter not addressed in the Petition filed by the National Association of Greeting Card Publishers (NAGCP) in No. 81-1304 or the Petition filed by United Parcel Service (UPS) in No. 811381.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A to the NAGC Petition in No. 81-1304; Appendix B to the NAGC Petition

contains the Decision of the Governors dated March 10, 1981; and Appendix C contains the relevant sections of the Postal Reorganization Act. The Court's order denying CPUM's Petition for Rehearing is printed in Appendix D to the UPS Petition in No. 81-1381. Appendices A through D are incorporated herein by reference.

The Postal Rate Commission's Opinion and Recommended Decision is part of the record before the Court below. The section of the Commission's Opinion dealing with the status of Presorted Mail rates is reproduced in Appendix E. Appendices E, F, G and H are printed at the end of this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 2, 1981; CPUM's petition for rehearing, filed November 17, 1981 was denied without opinion on January 11, 1982. This petition for certiorari was filed within 90 days of the latter date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case arises under the Postal Reorganization Act of 1970 (the Act), Pub. L. No. 91-375, 84 Stat. 719 et seq.) Appendix C of NAGC petition. The statutory procedures for the determination of postage rates under the Act have been described in the NAGC Petition, pages 3-4. That Petition also outlines the proceeding before the Postal Rate Commission which led to the decision of the Second Circuit from which review by this Court is sought. (NAGC Pet. pp. 6-9)

STATEMENT OF THE CASE

This case is the culmination of ten years of often

frustrating effort by large volume first class mailers to establish "Presorted First Class Mail" as a mail subclass entitled to rate determination under the standards of §3622(b) of the Act.

In the first postal rate proceeding under the Act, Docket No. R71-1, the large volume first class mailers requested the Commission to establish a bulk first class category. The Commission deferred consideration of the request on the ground that it involved a classification matter.[1] Subsequently, in Docket No. MC73-1, a mail classification proceeding, the Postal Service proposed, among other changes, the establishment of a discount for presorted first class mail. (App. E, p. 1) That case was litigated and ended in an agreement to establish an interim mail classification schedule,[2] including a category for "presorted first class mail". The category was put into effect on July 6, 1976, and, in the subsequent five years, it has grown to one of the major mail categories. By 1981, the estimated volume of presorted first class mail was approximately 15 billion pieces, (App. H) and the Postal Service projects that volume to reach 25 billion pieces within a few years.

In its Opinion in Docket No. R77-1, issued after the establishment of the discount for presorted mail, the Commission states that the new category was a "rate

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[1]Opinion and Recommended Decision of the Postal Rate Commission, Docket No. R71-1, June 5, 1972.

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[2]Action of The Governors Under 39 U.S.C. §3623 And Supporting Record In the Matter of Establishing A Mail Classification Schedule, Docket No. MC73-1, April 15, 1976. Paragraph 9 of the Stipulation and Agreement approved by the Commission and the Governors fully provided that the interim classification schedule did not satisfy the requirements of §3623 of the Act.

category" and not a "subclass", (3e) although all of the witnesses in that proceeding, including the Postal Service and Rate Commission witnesses, had described it as a "subclass". The effect of the difference in definition is that, for a subclass, the Commission must apply statutory standards in recommending rates, particularly §3622(b)(3) which requires that the rates for each class and subclass be designed to recover the attributable cost of the subclass plus a reasonable portion of all other costs. However, by calling presorted mail a "rate category", the Commission could avoid application of the statutory standards (3e).

When the rate decision in R77-1 was issued May 12, 1978, a mail classification proceeding was then in process before the Commission, Docket No. MC76-5, the objective of which was to replace the interim classification schedule with the permanent Domestic Mail Classification Schedule (DMCS) satisfying the requirements of §3623 of the Act. On November 29, 1978 the Commission issued its Opinion and Recommended Decision in Docket No. MC76-5 recommending a permanent DMCS. That Opinion and Recommended Decision was approved by the Decision of the Governors on April 3, 1979.[3]

With the Governors' approval of the Commission's recommendations, a comprehensive classification schedule was made effective. This was the DMCS required by the statute. The Governors stated:

> "Our adoption of this recommended decision also establishes the 'substantive framework' for the mail classification schedule, referred to in

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[3]Decision of the Governors of the United States Postal Service Re: Recommended Decision of the Postal Rate Commission Regarding the Proper Scope and Extent of the Mail Classification Schedule, Docket No. MC76-5, April 3, 1979.

> paragraph E9 of the Docket No. MC73-1 Stipulation and Agreement, and terminates the agreed upon restrictions on the Service's 39 U.S.C. §3641 temporary classification authority, which is contained in paragraph E9 of that Stipulation."[4]

The Governors' Decision establishing the permanent DMCS, divided first class mail into four subclasses, Regular, Presorted, Post Cards and Priority Mail. Appendix F sets forth that portion of the DMCS establishing those subclasses.

In the instant rate case, Docket No. R80-1, CPUM presented evidence and expert testimony regarding the level of rates for presorted letters and cards as a subclass under the standards contained in §3622(b) of the Act. CPUM also presented general testimony describing the characteristics of presorted mail and showing why it constituted a valid subclass, as provided in the DMCS. (See excerpt from CPUM's witness Larson's testimony in Appendix G, p. 4.)

The Commission not only ignored the binding effect of the DMCS, it did not acknowledge the schedule's existence, and attempted to block any reference to the DMCS during the hearing.[5] In its Decision, the Commission ruled that its interpretation of presorted mail as a "rate category", made in Docket R77-1, an interpretation based on the ambiguous interim classification which had been adopted in 1976 and superseded in 1979, was the binding standard (5e); that the burden of proof was on the bulk first class mailers to persuade the Commission to establish presorted first class mail as a subclass; that CPUM had failed to meet

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[4]Id. p. 8

[5]For example, the Chairman of the PRC cut off counsel's opening statement which sought to explain CPUM's reliance on the DMCS. Appendix G, pp. 1-2.

the burden of proof; and that presorted mail remains a "rate category". (10e) Not a word can be found in the entire discussion explaining the Commission's total disregard of the DMCS. (Appendix E, pp. 1-17)

On appeal to the U.S. Court of Appeals for the Second Circuit, the Court glossed over the Rate Commission's failure to address the significance of the Domestic Mail Classification Schedule, and ruled that, even if that classification schedule had any significance, the Commission had the right to change its mind and revoke the subclass status given by the DMCS.

REASONS FOR GRANTING THE WRIT

A. Both the Commission and Court Decisions Are Contrary To Law

The Court of Appeals' opinion affirming the Commission's erroneous action, violated five major principles of law established by the Administrative Procedure Act and the decisions of this Court.

(1) The Court of Appeals perceived the issue:

> "The crux of CPUM's argument is that presorted first-class mail was definitely established as a subclass as part of a classification schedule adopted in 1979, see Docket No. MC76-5." (P. 45a)
>
> The Court also observes without comment that:
>
> "The PRC never mentioned the existence of the 1979 classification schedule in its recommended decision to treat presorted mail as a rate category." (p. 45a)

The Court provides no explanation of how or why it could sanction the PRC ignoring the DMCS, which was the legally established tariff of the Postal Service and, as

such, binding on the PRC until changed by lawful means. The DMCS was a formal agency regulation issued pursuant to a statutory directive; as a lawfully effective regulation it has the force and effect of a statute; an agency is as much bound by its own regulations as the public to whom it is directed. 2 Am. Jur. 2d, Administrative Law, §309; Attorney General's Manual on the Administrative Procedure Act, p. 30, ftn. 3, (1947); *Columbia Broadcasting System* v. *U.S.*, 316 U.S. 407, 86 L.Ed. 1563, 62 S. Ct. 1194 (1942); *Arizona Grocery Co.* v. *Atchison, T. & S.F. R. Co.*, 284 U.S. 370 (1932). *Service* v. *Dulles*, 354 U.S. 363 (1957); *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Atchison, T. & S.R.F. Co.* v. *Scarlett*, 300 US 471, 474; *American Broadcasting Co. v. F.C.C.*, 179 F.2d 437 (D.C. Cir. 1949); *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342 (D.C. Cir. 1965). *Compania Anonima Venezolana De Navegacion v. A.J. Perez Export Co.*, 303 F. 2d 692, 696 (5th Cir. 1962); *United States v. Associated Air Transport, Inc.*, 275 F.2d 827, 832-833 (5th Cir. 1960); *Carter v. A.T.&T.*, 365 F. 2d 486 (5th Cir. 1966); *River Terminal Corp. v. Southwestern Sugar & Molasses Co.*, 253 F.2d 922 (5th Cir. 1958); *North Am. Phillips Corp.* v. *Emery*, 579 F.2d 229, 233 (2d Cir. 1978).

(2) Furthermore, since the effect and significance of the DMCS (but not its applicability) was a material and relevant issue in R80-1, the Commission's refusal to explain its position on a material issue was arbitrary and capricious and contrary to law. See *Beaumont, S.L. & W.R.C.* v. *U.S.*, 282 U.S. 74, 86, 75 L.Ed. 211, 230 (1930); *Florida* v. *U.S.*, 282 U.S. 194, 215, 75 L.Ed. 291, 304 (1931); *U.S. v. B. & O. R. Co.*, 293 U.S. 454, 464, 79 L.Ed. 587, 594-595 (1935); *U.S.* v. *Chi. M. St. P. & P.R. Co.*, 294 U.S. 499, 510-511, (1935); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 195-197, (1941);

U.S. v. Carolina F. Carriers Corp., 315 U.S. 475, 488-9, 86 L.Ed. 971, 982 (1942); *SEC v. Chenery Corp.*, 318 U.S. 80, 93-5, 87 L.Ed. 626, 636-7 (1943); *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. (1945); *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968); *NLRB v. Columbia University* 541 F.2d 922, 930 (2d Cir., 1976); *Marco Sales Co.* v. *FTC*, 453 F.2d 1, 7 (2d Cir. 1971) *In re United Corp.*, 249 F.2d 168, 179 (3d Cir. 1957), *South Carolina Generating Co.* v. *FPC*, 249 F.2d 755, 764 (4th Cir., 1957), *cert. den.*, 356 U.S. 912. *Pub. Serv. Comm. of N.Y. v. FPC*, 436 F.2d 904 (1974).

(3) The obligation of an agency to explain its action is even more compelling when the decision is inconsistent with an outstanding rule. *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807, 37 L. Ed.2d; *Secy of Agriculture* v. *U.S.*, 347 U.S. 645 (1954); *Marco Sales Co.* v. *F.T.C.*, 453 F.2d 1, 7 (2d Cir. 1971). The DMCS was a regulation issued pursuant to a formal rule-making proceeding implementing a statutory requirement; it was entitled to preemptive weight. See *Attorney General's Manual, supra.* The Commission's statement in Docket No. R77-1 was merely an interpretation of an earlier regulation that, by its own terms, did not meet the statutory standard, and which had been superseded by the DMCS. The R77-1 interpretation of the interim classification schedule was entitled no preference over the later, unequivocal, definition established pursuant to a full rule-making proceeding.

(4) The Court affirmed the PRC's decision, stating

> "Based on the evidence presented, the PRC concluded that the cost characteristics and market demand elements of presorted first class mail are not sufficiently different from that

> of regular first-class mail *to justify subclass status*". p. 46a. (Emphasis added)

CPUM had no burden of proof to "justify" subclass status; whether presorted mail was a subclass was not a threshold issue before the Commission; that status had been determined in Docket No. MC76-5. Out of an abundance of caution, but not because it had a burden to sustain, CPUM included in its prepared rate testimony background testimony to demonstrate that presorted mail had the general characteristics of a subclass. *No rebuttal testimony was offered.* Nevertheless, the Commission held that the burden of justifying subclass status was on CPUM and that CPUM had not sustained that burden. The Second Circuit Court erroneously affirmed the Commission's decision.

The Administrative Procedure Act (APA) provides that "the proponent of a rule or order has the burden of proof". 5 U.S.C. §556(d). CPUM was supporting the established rule, not proposing a new rule. The Commission's decision shifted the burden of proof to Petitioner, contrary to the requirement of 5 U.S.C. §556(d). If an agency is the proponent of a change in an existing rule, the agency has the burden of proving that the existing rule is unreasonable, and that the proposed change will produce a just and reasonable result. *Columbia Gas Transmission Corp. v. FERC,* 628 F.2d 578, 580 (D.C. Cir. 1979); *Public Service Commission of N.Y. v. FERC,* 642 F.2d 1335 (D.C. 1980), *cert. den.,* 70 L.Ed.2d 189. The converse of this principle is equally true, that a person governed by a rule, regulation or tariff, has the right to rely on the presumed validity of that rule. The improper shifting of burden of proof is reversible error. *I.C.C. v. J-T Transport Co.,* 368 U.S. 81, 90 (1961).

(5) When the Second Circuit ruled that "the PRC is free to change presorted mail status from a subclass (45a) and that "we can see no reason why a change in

classification treatment may not occur during the course of the rate making proceeding" (Id.), the Court created a defense for the PRC, which the Commission itself had not espoused. The court "propelled [itself] into the domain which Congress has set aside exclusively for the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1945); *FPC v. United Gas Pipeline Company*, 33 U.S. 71 (1968). The Court's rationale, which is neither the Commission's rationale, nor supported by the record, should be vacated.

B. The Issue is Important and Recurring

Presorted mail is now one of the three largest types of mail handled by the Postal Service, larger by far than many other classes and subclasses for which rates are fixed according to statutory standards.[6] Since 1976 the Postal Service has experienced a sharp rise in productivity due in no small part to the worksharing provided by the rapid growth of presorted mail. Yet, the Commission, by disregarding the subclass status of presorted mail established by the DMCS, has asserted the privilege of prescribing rates for presorted mail on the basis of its own contrived, intangible standard. The result is a rate for presorted letters at least one cent, and possibly 2 cents, higher than that consistent with the standards of §3622(b). Every penny of excessive charges costs the large volume mailers $150 million per year; a rate that is two cents too high, in effect for two years, will impose excess costs on the users of presorted mail of $600 million.

The issue of postage rates for this large and rapidly growing category will recur time after time, every two or

[6]The Commission's volume projections are set forth at Appendix H.

three years, for the foreseeable future. The Commission must be directed to observe the requirements of the Postal Reorganization Act and the Administrative Procedure Act, or the ten year effort to effect postal reform will have been to no avail.

CONCLUSION

This Court should grant certiorari and, on review, reverse the Second Circuit's decision upholding the Postal Rate Commission's decision denying presorted first class mail the status of a subclass that was established by the Domestic Mail Classification Schedule.

Respectfully submitted,

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April 8, 1982

Appendix

Docket No. R80-1

3. Presorted Mail

[0670] This is the second proceeding in which the discount for presorted first-class mail has been considered. Presorted first-class mail was first established in Docket No. MC73-1 to provide the mailer who presorts with equitable compensation for the costs that the Postal Service avoids as a result of presortation, and to encourage such worksharing.[1] First-class presortation discounts currently apply to letters and post cards that are presorted to the appropriate 3- or 5-digit level. In this proceeding we recommend adoption of the Service's proposal to add a second tier of discounts for mail from these rate categories that is presorted to carrier route.

[0671] For the first tier, the Postal Service proposes that the current discount of two cents for presorted letters be increased to three cents, but that the current discount of one cent for post and postal cards remain unchanged.[2] The OOC concurs.[3] NAGCP opposes

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[1]See PRC Op. MC73-1, p. 13.

[2]USPS-T-10 (Allen), p. 26.

[3]OOC-T-800 (Collins), pp. 8, 11.

increasing the presort discounts. ABA/CPUM,[1] ARF,[2] and RDA [3] propose a five cent discount for presorted letters. RDA makes an alternative discount proposal of four cents for presorted letters.[4] ABA/CPUM propose that a degression of two cents for each additional ounce be incorporated in the rate for presorted letters. They also propose that the discount for presorted cards be increased from one to two cents.[5]

[0672] For the second tier of presortation discounts (carrier route presort), the Postal Service proposes a discount of one cent from the rate for the first tier for presorted letters, and presorted post cards.[6] The OOC proposes a discount from the first tier of .7 cents for presorted letters and cards.[7] ABA/CPUM propose a discount from the first tier of 1.2 cents for presorted letters and post cards.[8]

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[1]CPUM-T-2, p. 21. ABA/CPUM also propose that a separate tier be established for presortation to the 3-digit level only, and that such mail receive a 3-cent discount. *Id.* at 13.15.

[2]Direct Testimony of Richard E. Bentley on Behalf of American Retail Federation, p. 4.

[3]RD-T-2, p. 12.

[4]*Id.* at 25.

[5]CPUM-T-2, p. 21.

[6]USPS-T-10, p. 26, Request of the United States Postal Service for a Recommended Decision on Changes in Rates of Postage and Fees From Postal Services, Attachment A, Schedule A-1.

[7]OOC-T-800, pp. 9, 11.

[8]CPUM-T-2, p. 4.

Docket No. R80-1

[0673] The major legal issue raised with respect to presorted first-class mail is whether one or more of the presort categories should be afforded the status of a subclass, to which all the § 3622(b) factors must be applied in determining rates, or whether they should remain rate categories, for which this approach to rate determination is not mandatory.[1] The major factual issue is whether the size of the proposed discounts is based upon proper estimates of the costs avoided by presorting.

a. Subclass v. Rate Category

[0674] The subclass rate category issue was first raised in Docket No. R77-1. There we concluded that presorted first-class mail groups were rate categories rather than subclasses for purposes of §§ 3622(b) and 3623. We therefore concluded that we are not required to apply all of these statutory criteria to each of these groups of mail independently in determining their discount rate.[2]

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[1]See PRC Op. R77-1, p. 241.
[2]*Id.* at 243-49.

Docket No. R80-1

[0675] The parties (most notably RDA and ABA/CPUM) assert that it is appropriate to reexamine this issue because for the first time since presorted first-class rates were instituted, RCA attributable/assignable cost data collected separately for the various presorted categories of first-class mail are available. The parties assert that we are now obligated to base rates for presorted first-class mail in the Postal Service's ongoing independently evaluate their contributions to system residual costs.

[0676] As we explained in Docket No. R77-1, including presorted first-class mail in the Postal Service's ongoing cost data reporting systems does not necessarily imply that a given ratemaking approach was intended any more than it would with respect to other groups of mail.[1] As we noted there, separate RCA data can serve multiple purposes, among them that of helping to measure cost avoidance due to presorting.[2]

[0677] The parties repeat several other arguments advanced and disposed of in our discussion of the issue in Docket No. R77-1. Among them is the argument that

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[1]PRC Op. R77-1, p. 245.

[2]*Id.* at 244-45.

both the Postal Service and the Commission have always intended presorted first-class mail to have separate subclass status. With respect to the Postal Service, this is a moot point, since it has conceded that it contemplated subclass status for this mail until our opinion in R77-1 concluded the contrary, and now accedes to that conclusion.[1] With respect to the intent of the Commission, it is somewhat surprising that the parties would continue to press this point, since we unambiguously stated otherwise in Docket No. R77-1, the only occasion that we have had to address this specific issue.[2]

[0678] In Docket No. R77-1 we went on to observe that whether presorted first class is a category for which residual cost contributions were intended to be evaluated separately, or in terms of the contribution of a broader subclass to which it belongs, is best determined by the substantive purpose for which the category was established, and the factors considered in recommending its creation.[3]

[0679] After reviewing the history of the presorted discounts for first-class mail, we concluded that their purpose was to bring about a structural reform within first class in order to align rates with costs, rather than give recognition to unique characteristics of presorted first-class mail which would warrant an independent

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[1]Tr. 58/20,816-17.

[2]We did not, however, rule on the factual question of whether presorted first-class mail possesses those unique cost and demand characteristics that would make separate application of the §3622(b) factors appropriate. We therefore must address this issue *infra*.

[3]*Id.* at 246.

application of all the § 3622(b) factors. It was designed to give equitable compensation to the mailer who saves costs for the Postal Service by presorting, to encourage such work sharing by mailers, and, thereby, improve service.[1] The factors that we considered in approving these discounts were the cost avoidance characteristics of presorting and the conditions of mailing and rate structure that would best reflect those characteristics. We took the same approach in making comparable structural reforms that instituted the presort rate categories in second, third, and special-rate fourth-class mail, and the degressive rate for first-class letters, that we did in Docket No. MC73-1.[2]

[0680] We concluded, in R77-1, that it was consistent with the policies of the Act to offer presort discounts for first-class mail in the amount of the costs clearly avoided, so that the aggregate and per-piece residual cost contributions of first-class letter mail would not thereby be impaired.[3] For the reasons explained below, we are not persuaded by this record that this approach is no longer the one that will best serve the policies of the Act.

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[1]*Id.* at 247.

[2]PRC Op. R77-1, pp. 316-32; PRC Op. MC78-2 pp. 61-64; PRC Op. MC73-1, pp. 53-59; PRC Op. R74-1, pp. 195-96.

[3]PRC Op. R77-1, pp. 248-49.

Docket No. R80-1

[0681] ABA/CPUM assert that presorted first-class mail has all the characteristics of a class of service in utility theory. They contend that, in utility theory, there are generally two main lines of inquiry in determining whether to establish a separate class of service: market analysis to identify groups of customers with homogeneous demands for service, and operations analysis to determine if the utility provides "identifiable packages of services for identifiable customer groups."[1] They then describe those characteristics of presorted first-class mail that they contend satisfy those two major criteria.

[0682] Basically, they seek to distinguish presorted from nonpresorted mail by characterizing the former as involving "wholesale" services and customers, and the latter "retail" services and customers, a distinction, they maintain, that is reflected in the classification structure of the gas, electric power and telephone industries. With respect to services provided, they contrast the "retail" collection services and facilities, the diverse physical mail characteristics, the peaking of traffic and the resulting lower "load" factors, associated with nonpresorted first-class mail, to the "wholesale" modes of entry (trays/sacks/pallets/trucks), uniform physical

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[1]CPUM-T-2, pp. 7-8.

mail characteristics, and off-peak traffic, associated with presorted first-class mail.[1] With respect to differences in market demand between presort and nonpresort mailers, however, this is merely asserted merely in conclusory terms.[2]

[0683] Generalization concerning the factors looked to in defining classes of service in the utility field are not, however, particularly instructive in defining classes of mail. The reasons are partly economic and partly legal. The natural gas, electric power and telephone industries, for example, market a largely homogeneous product. Demand differences among the customers for that product are therefore the principal criteria used in defining classes of service. Common carriers of freight, on the other hand, provide an essentially uniform transportation service for widely diverse cargoes. Physical characteristics of the cargo handled are therefore the principal criteria for defining classes of service. The wholesale/retail distinction drawn by witness Larson, therefore, has limited relevance in determining appropriate criteria for classifying mail. We note that the economic validity of offering bulk rates (both WATS and Telpak) to high-volume telephone customers has recently been brought into question.

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[1]CPUM-T-2, pp. 10-15.

[2]The only specific distinctions mentioned are the size of mailings and peaking of traffic. *Id.* at 8-10.

Further, common carriers offering delivery services that are most analogous to mail delivery (the delivery of specifically addressed parcels) generally do not offer volume-based differences in rates or services.

[0684] From a legal standpoint as well, it is not particularly useful to resort to generalizations about other regulated industries to answer the question of when classification of mail is appropriate under the Act. In the case of postal services, the legal consequence of establishing a separate classification is not merely to allow a distinct rate to be charged, but to make applicable all of the various criteria of § 3622(b) when determining that rate. This legal consequence is unique to mail classification.

[0685] For these reasons we must look primarily to the Act itself in determining appropriate criteria for establishing separate classes or subclasses of mail.

[0686] Since presorted first-class is available at a distinct rate, regardless of its legal status, and does not involve service standards distinct from nonpresorted first-class mail, §§ 3623(c)(3), (4) and (5) are not in issue. The pivotal considerations, therefore, are those of fairness ((c)(1)) and whether the "value" of the matter mailed at the presort rate ((c)(2)) is sufficiently distinct to warrant separate application of all the § 3622(b) ratemaking criteria. Questions of fairness in the context of presorted first-class mail primarily involve the relationship of costs and rates. Questions of the "value" of the matter mailed, insofar as they can be evaluated objectively, involve an evaluation of market demand. Therefore, the critical factors to be considered are whether the cost characteristics and market demand characteristics of presorted first class are sufficiently different to warrant independent evaluation under the § 3622(b) factors.

[0687] The record demonstrates that the differences in unit attributable/assignable costs between these two

groups of mail lies somewhere between 2.87 and 7.1 cents.[1] For purposes of this inquiry this is sufficient to establish the requisite cost differences between the two groups of mail.

[0688] With respect to market demand, the evidentiary record is meager and the alleged difference between the two mail groups is conclusory. Considerations appropriate for evaluating demand differences include the availability of alternative services such as EFT and electronic mail, the various commercial and personal purposes for which these respective mail groups are characteristically used, the nature of the service performed (e.g., whether it includes collection and sorting), eligibility requirements (such as minimum volume, depth and extent of presortation), the quality of service, including speed and consistency of delivery, free forwarding, etc., freedom from inspection, the perceived value of the content, and the mailer's willingness to pay, generally.

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[1]Response of the United States Postal Service to Presiding Officer's Information Request No. 3, Question No. 1.

[0689] All of these factors would be reflected in the elasticity of demand for these respective mail groups. Substantially different elasticity coefficients for these respective groups would constitute a *prima facie* showing that the requisite demand differences exist. Separate elasticity coefficients have not, however, been estimated on this record, nor have market studies been provided from which substantial differences in demand curves might reliably be inferred. Absent objective or quantitative evidence, the evidence we must rely on is subjective and descriptive. Such evidence must, therefore, clearly point in the direction of substantial demand differences, before we may recognize presorted first-class as an independent subclass.

[0690] ABA/CPUM witness Larson sought to establish a dichotomy between hand-addressed, individually stamped mail of widely diverse shape and size, entered by individuals, often at peak hours, a few pieces at a time, and machine-addressed, prepaid, physically uniform, presorted mail, entered in bulk by large institutions. The former, it asserts, characterize nonpresorted first-class mail, while the latter characterize presorted first-class mail.[1] If nonpresorted

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[1]CPUM-T-2, pp. 8-15.

first-class mail were dominated by the former, we would conclude that the requisite distinction in demand characteristics between the two mail groups exists. But we find that this dichotomy does not accurately characterize nonpresorted and presorted first-class mail.

[0691] The parties urge us to make our classifications of first-class mail consistent with those recognized in third-class, where single-piece and bulk regular rate are separate subclasses. This comparison, however, undermines, rather than supports, their position. The above-described dichotomy drawn by ABA/CPUM is, in fact, a valid characterization of the differences between third-class single piece mail and third-class bulk regular rate mail. Third-class single piece mail is dominated by flats and small parcels mailed by individuals that would have been entered as parcel post if they had been heavy enough to qualify.[1] As a result, it is basically non-uniform with respect to size, shape, form of address, form of payment, mode of entry, etc. Third-class bulk mail is almost entirely machine-addressed, physically uniform advertising circulars and catalogues entered in bulk by advertisers. This sharp

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[1]See Opinion and Recommended Decision after Exceptions Denying the Officer of the Commission's Proposals to 1) Eliminate Single Piece Third-Class and 2) Expand Parcel Post to Include Pieces Weighing Less Than One Pound, Docket No. MC76-3, June 19, 1978. This is especially true of the test year, since the volume associated with the first four ounces of third-class single piece mail is assumed to shift to first class. See para. 0664, fn. 1, *supra*.

dichotomy in customer base and content permits little doubt as to their substantially different demand as well as cost characteristics. That difference is reflected in their estimated elasticity coefficients (-.15 for single piece, -.65 for bulk regular circulars, -.45 for bulk regular catalogues.)

[0692] The situation in first-class appears to be significantly different. Presorted first class, like third-class bulk rate regular mail, may be assumed to be homogeneous in terms of size and shape, the manner in which it is addressed and paid for, and customer base. But nonpresorted first class, unlike third-class single piece mail, does not appear to be dominated by nonuniform, individually mailed pieces. Although precise figures are not available, it appears unlikely that much more than one fifth of nonpresorted first-class potentially belongs to this category.[1]

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[1]Household originating first class constituted 27.6 percent of first-class mail in calendar year 1977. Household Mailstream Study, Vol. 1, p. 6. If it is assumed that no presorted first-class mail is household originating mail, and therefore the proportion of first-class mail comprised of presorted mail is excluded, this yields an estimate that 37 percent of nonpresorted first-class mail will be comprised of household originating mail in the test year, after rates. Bill payments constitute approximately 40 percent of household originating mail (*Id.* at 172). Assuming that a standard envelope with a preprinted address furnished by the billing party is used to pay the bill, only 60 percent of household originating mail, or 22 percent of nonpresorted first-class mail, is potentially nonuniform, individually mailed mail.

In contrast, roughly two-thirds of nonpresorted mail is sent by business, nonprofit organizations, or government. It therefore exhibits, to a varying degree, many of the characteristics of presorted first-class mail, including standard size and shape, machine-applied addresses, prepaid postage, mail preparation (bundling/traying/sacking/sorting),[1] entry in bulk, customer base[2] and mail content (bills, orders, payments, and other transactions).[3] In terms of demand related characteristics, therefore, it apears likely that the typical nonpresorted first-class mail piece has more in common with presorted mail than it has with "Aunt Minnie" component of nonpresorted mail. Therefore the record does not adequately demonstrate that there are unique demand characteristics for presorted first-class mail that would warrant treating such mail as a

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[1]Tr. 22/7475.

[2]The record indicates that while utilities and financial institutions are the principal users of first-class presorted mail, presorted mail is a relatively small portion of the first-class letter mail sent by the financial institutions referred to (USPS-T-10, p. 33; Direct Testimony of William Frazer, pp. 5-8, 14-17). The same is true of manufacturers and wholesale distributors (USPS-T-10, pp. 32-33). To a large extent, then, the presorted letter mailer and the mailer of nonpresorted business mail appear to belong to the same customer group.

[3]USPS-T-10, pp. 30-31.

separate subclass for purposes of § 3622(b). Even if the record were to indicate sufficiently distinct demand characteristics for presorted first-class mail, it would be inadequate to show whether all presort categories should be aggregated into a subclass, or whether separate subclasses should also be recognized for presorted post cards and for the separate tiers of presortation.[1]

[0693] We find that presorted and nonpresorted first-class mail are alike with respect to speed and consistency of delivery, free forwarding, and freedom from inspection. Presorted and most nonpresorted first-class mail appear to be more similar than dissimilar with respect to customer base, and content, but more dissimilar than similar with respect to mode of collection and degree of sortation. With respect to the demand curves that the two categories are likely to exhibit, we find that the record does not demonstrate that the cited dissimilarities are sufficient to override the more basic similarities that we have identified

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[1]Reader's Digest (RD-T-2, p. 10) and ABA/CPUM (CPUM-T-2, p. 15) disagree on this point. Whether demand characteristics are sufficiently different to support separate subclass status for various presort tiers in third-class bulk regular rate mail is a legitimate issue in this proceeding. (*See* para. 0623 fn.1, *supra*).

between the respective categories.

[0694] Because the parties have not established the requisite demand differences to warrant our recognizing presorted first-class mail as a separate subclass, we will continue to recognize it as a rate category for which the cost avoidance approach to rate design is appropriate.

Classification Schedule 100
FIRST-CLASS MAIL

100.01 DEFINITION

100.010 Any matter eligible for mailing may, at the option of the mailer, be mailed as first-class mail.

100.011 The following must be mailed as first-class mail, unless mailed as express mail or exempt under title 39 United States Code:

a. Mail sealed against postal inspection as set forth in section 5000 of the General Terms and Conditions;

b. Matter wholly or partially in handwriting or typewriting except as specifically permitted by sections 200.013, 300.010, 300.0101, 400.021, 400.022 and 400.043; and,

c. Bills and statements of account.

100.02 DESCRIPTION OF SUBCLASSES

100.020 Regular mail.

Regular first-class mail consists of mailable matter posted at first-class regular rates, weighing 12 ounces or less, and not mailed or eligible for mailing under sections 100.021, 100.022, 100.023, or 100.024.

100.021 Postal and post cards.

a. A postal card is a card with postage imprinted or impressed on it supplied by the Postal Service for the transmission of messages. A post card is a privately printed mailing card for the transmission of messages.

b. Double postal or post cards may be mailed as postal or post cards. A double postal or post card consists of two attached cards, one of which may be detached by the receiver and returned by mail as a single postal or post card.

c. To be eligible to be mailed as a first-class post card, a card may not exceed any of the following dimensions:

i. length not greater than 6 inches;
ii. width not greater than 4-1/4 inches; or,
iii. thickness not greater than 0.0095 inch and uniform.

100.022 Presorted Mail

Presorted first-class mail is first-class mail other than zone rated (priority) mail which is presented in a single mailing of 500 or more pieces, properly prepared and presorted.

100.023 Zone Rate (Priority) Mail

Zone rated (priority) first-class mail consists of (1) first-class mail weighing more than the maximum weight established for first-class regular mail and (2) other mail matter which, at the option of the mailer, is mailed for expeditious mailing and transportation. Priority mail may weigh up to and including 70 pounds.

Rate Schedule 102
FIRST CLASS
PRESORTED MAIL

	Cents
Regular mail weighing 12 ounces or less:	
First ounce or fraction	17
Additional ounce or fraction	17
Post Card	12

This rate applies only to each piece of a group of ten or more pieces destined for the same five-digit ZIP Code or each piece of a group of fifty or more pieces destined for the same three-digit ZIP Code. The mailing must consist of at least 500 pieces properly prepared and presorted as prescribed by the Postal Service. Presorted pieces not in groups of ten or fifty pieces as described above are subject to the regular rate in Schedules 100 and 101.

MR. THREADGILL: Coming to our particular position of CPUM in its presentation I think it is evident from our presentation that we take the view that presorted First Class mail is a subclass. Some of the witnesses who take contrary positions have placed some reliance on statements made in Docket R77-1, that is a "rate category". As a lawyer I submit that the reliance is misplaced.

The Commission in R77-1 was interpreting a settlement. We have presented through Mr. Larson some of the background evidence in 73-1 to point out the understanding of the parties as to what took place in 73-1 was to the contrary.

Nevertheless, in Docket No. R77-1 the Commission said if the Postal Service believes that presorted First Class mail is a subclass they should request a recommended decision establishing it as a subclass.

MR. SHARFMAN: Mr. Chairman, I apologize to Mr. Threadgill, I hate to interrupt in the middle of his statement. However, I would request where it is an appropriate time to make such a statement and I would ask whether if Mr. Threadgill intends to present oral arguments on legal issues at this point he expects other

counsel have the same opportunity to reply to his legal arguments this morning or in the future. Normally oral argument has been saved for the brief and I suggest that is sound practice and Mr. Threadgill should get on with presenting his witness rather than discussing the law with the Commission.

MR. THREADGILL: I think an opening statement is appropriate to set the framework in which our witnesses are testifying. I am not making oral argument at this time.

PRESIDING OFFICER FRITSCHLER: It seems to me it is getting close to oral argument, it is at least bordering on it, and the other attorneys might want to have the same opportunity and I do not believe the Commission could provide them with that opportunity at this time. So I believe it would be more prudent if we were to move now to the witness.

MR. THREADGILL: All right.

DIRECT EXAMINATION

BY MR. THREADGILL:

Q Would you please state your name for the record?

A Charles A. Larson.

Q I hand you a copy of a document entitled "The Direct Testimony of Charles A. Larson", also identified as CPUM-T-2.

MR. THREADGILL: And that was the point of my opening address which I was not permitted to complete, and that is despite the ruling in R77-1, which took place in May of 1978. Six months later in MC76-5 the Commission issued an opinion and recommended decision which defined presorted mail as a subclass. In April 1979 the Board of Governors of the Postal Service adopted the Domestic Mail Classification Schedule which expressly defines presorted mail as a subclass. I just think the challenge to the Commission's decision and the Board of Governors is wrong.

MR. FANG: I would point out, Mr. Chairman, that the decision to which counsel refers in MC76-5 addressed the scope and extent of the Domestic Mail Classification Schedule not changed the substance of any existing rate schedules and rate categories which be put into effect by the Commission's earlier decision, and the Postal Service's acceptance thereof in R67-1.

PRESIDING OFFICER FRITSCHLER: I believe if Mr. Larson is allowed to answer this question it would simply enhance the record and not do it any harm, so I would overrule the objection.

THE WITNESS: As my counsel stated, I did not approach it from a cost-avoidance point of view, and therefore, I really do not have an opinion on what the results would be.

rate differential to two cents. In that proceeding, there were no recorded attributable costs for the new category and all four witnesses made "guesstimates" of what the MC73-1 cost analysis would be if projected to the R77-1 test year.* In the meantime in Docket No. MC76-5 a Domestic Mail Classification Schedule was recommended by the Commission and adopted by the Board of Governors. That Schedule established Presorted Mail as a separate subclass of First Class Mail with a separate rate schedule to define the applicable rates not as a "discount" but with specified rates. (CPUM Exhibit-7)

Presorted first-class mail has all of the characteristics of a class of service in utility theory. This opinion is supported by my examination of the general principles of classification of utility and transportation services, examination of the characteristics of first-class mailers, and the services provided for first-class mail, and some examination of the characteristics of other mail classes and subclasses under the Act.

The basic purpose of classification of utility service is to provide a rational basis for a reasonable discrimination in rates and service. Classification generally involves two steps - first, an analysis of the market served to determine whether there are groups of customers that have relatively identifiable and homogeneous demands for service; and second, an analysis of the utility's or carrier's operations to

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*It should be observed that USPS witness Winston testified in MC73-1 that when attributable costs became available for the new subclass, it would be priced independent of the rate for single piece first-class mail. (Tr. 10238). (CPUM Exh.-6)

Table 1

Volume Projections at PRC Recommended Rates

Category of Mail or Service	Volume (000)
First Class:	
Letters & Sealed Parcels	43,509,760
Presort Letters	15,073,250
Postal Cards	288,499
Post Cards	1,702,384
Presort Cards	425,861
Priority Mail	237,720
Express Mail	26,645
Second Class:	
Within County	1,140,156
Outside County:	
Regular Rate	5,823,529
Nonprofit	2,289,307
Classroom	54,793
Transient	14,662
Third Class:	
Single Piece	231,778
Bulk Regular Ordinary:	
Carrier Route Presort	8,485,096
Five Digit Presort	2,593,165
All Other	6,626,261
Bulk Regular Books & Catalogs:	
Carrier Route Presort	2,050,659
Five Digit Presort	706,027
All Other	1,894,711
Bulk Nonprofit Ordinary:	
Carrier Route Presort	478,702
Five Digit Presort	225,047
All Other	7,306,673
Bulk Nonprofit Books & Catalogs:	
Carrier Route Presort	11,161
Five Digit Presort	5,247
All Other	170,357
Fourth Class:	
Parcel Post	171,562
Bound Printed Matter	117,738
Special Rate	231,382
Library Rate	61,858
Government Mail:	
Franked	496,341
Penalty	3,010,122
Free for Blind	35,964
Special Services:	
Registry	45,156
Certified	96,889
Insurance	42,294
Collect-on-Delivery	10,703
Special Delivery	31,318
Money Orders	895,594
TOTAL VOLUME	105,812,371

Opposition

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No. 81-1868

In the Supreme Court of the United States

OCTOBER TERM, 1981

COUNCIL OF PUBLIC UTILITY MAILERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding a decision by the Governors of the Postal Service implementing rates for presorted First-Class Mail recommended by the Postal Rate Commission, which characterized presorted First-Class Mail as a rate category rather than a subclass of First-Class Mail.

TABLE OF AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner seeks review of one aspect of the court of appeals' decision in *Newsweek, Inc.* v. *United States Postal Service*, 663 F. 2d 1186 (2d Cir. 1981)—the appropriate classification of presorted First-Class Mail. See 39 U.S.C. 3623. This Court recently granted review of another, unrelated, aspect of the same decision—the appropriate method for determining postal rates and fees under 39 U.S.C. 3622(b). *National Association of Greeting Card Publishers* v. *United States Postal Service*, No. 81-1304; *United Parcel Service of America, Inc.* v. *United States Postal Service*, No. 81-1381. The only connection between those cases and this one is that both grew out of the same postal rate proceeding and were reviewed together by the court of appeals. See 39 U.S.C. 3628. The issue presented by petitioner does not merit review by this Court.

1. Under the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, a change in postal *rates and fees* must be initiated by the Postal Service, which makes a request and submits its suggestions to the Postal Rate Commission. 39 U.S.C. 3622(a). The Commission then makes a recommended decision, based on the policies of the Act and the nine factors listed in 39 U.S.C. 3622(b), about the appropriate amount to be charged for each category of mail and type of service. The Governors of the Postal Service may then either approve the recommended decision, allow it under protest, reject it, or (in some circumstances) modify it. 39 U.S.C. 3625.

By contrast, a change in the mail *classification* schedule may be initiated by either the Postal Service or the Postal Rate Commission. In making a recommended decision about the status of, for example, presorted computer-originated bills, the Commission must take into account the six factors listed in 39 U.S.C. 3623(c). Once a recommended decision is submitted to the Governors, they may act on it in the same way as they do a rate recommendation. 39 U.S.C. 3625. Changes in the Domestic Mail Classification Schedule (DMCS) may of course be proposed by either the Postal Service or the Commission in connection with a general rate proceeding. In Docket No. R80-1, the rate proceeding involved in this case, the Postal Service suggested several such changes. And although the DMCS indicates that presorted First-Class Mail is a subclass of First-Class Mail, the Commission's recommended decision stated that it should be a rate category.[1]

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[1]The various classes of mail (First-Class, second class, etc.) are divided into subclasses, each of which, in general, is sufficiently distinct from the remainder of the class to warrant separate treatment for purposes of applying the factors in Section 3622(b). Subclasses may be further divided into rate categories that, although different from one another in some respects, are nonetheless usually similar enough to warrant evaluation together in rate-setting under Section 3622(b).

The Commission concluded, after applying the factors listed in Section 3623(c), that presorted and regular First-Class Mail are sufficiently alike that they should be grouped in the same subclass for purposes of assigning residual costs under Section 3622(b) (Pet. App. E-10 to E-17).[2] Both types receive the same speed and consistency of delivery, free forwarding, and freedom from inspection. Similarly, because approximately two-thirds of nonpresorted mail is sent by business, nonprofit, and government organizations, it generally shares such characteristics of presorted mail as standard size, machine-applied addresses, prepaid postage, entry in bulk, and mail content (bills, orders, etc.) (Pet. App. E-15 to E-16). Because presorted mail does save on sortation costs, however, the Commission recommended two tiers of discounts under the regular First-Class rate for presortation to the appropriate 3- or 5- digit level, and to carrier route (*id.* at E-1). The Board of Governors on March 10, 1981, allowed the Commission's recommended decision to take effect under protest. In turn, the court of appeals upheld the decision of the Governors, finding that the Commission had complied with the statutory procedure for making changes in classifications and that there was substantial evidence to support the Commission's treatment of presorted mail as a rate category (81-1304 Pet. App. 46a-47a).[3]

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[2]The Commission's recommendation was consistent with its recommendation in the preceding general rate case, Docket No. R77-1 (Pet. App. E-3).

[3]The court remanded for further reconsideration of other aspects of the case not involved here—the Commission's reductions of the Postal Service's general revenue requirements, and the proper methodology to be used in rate-making (see 81-1304 Pet. App. 48a).

In their March 10, 1981 decision allowing the Commission's recommendation to take effect under protest, the Governors returned the case to the Commission for reconsideration pursuant to 39 U.S.C. 3625(c)(2). On June 29, 1981, the Postal Service resubmitted its request after the

2. This Court granted certiorari in *National Association of Greeting Card Publishers* v. *United States Postal Service*, No. 81-1304 (Apr. 19, 1982), and *United Parcel Service of America, Inc.* v. *United States Postal Service*, No. 81-1381 (Apr. 19, 1982), in order to resolve a disagreement between the Second and the District of Columbia Circuits about the proper method for allocating Postal Service costs to classes of mail under 39 U.S.C. 3622(b). There is no such conflict in the courts of appeals over the appropriate classification of presorted mail. Moreover, unlike those earlier cases, this petition does not present a question about the proper interpretation of the Postal Reorganization Act that might have implications for other categories of mail in future classification proceedings. To say, as petitioner does (Pet. 10-11), that the issue of the proper rates and classification for presorted First-Class Mail will recur is simply to state the obvious fact that Congress has provided a mechanism for periodic readjustment of rates and classifications. The proper characterization of presorted First-Class Mail will undoubtedly be reevaluated in the future, and petitioner may again participate in hearings before the Commission and seek review in the court of appeals. Under these circumstances, review by this Court of petitioner's present position in the current complex of rates and classes is not warranted.

Commission's second recommended decision, which substantially reaffirmed its earlier recommendations. 39 U.S.C. 3625(d). After the Commission, on September 17, 1981, again refused to alter its recommended decision, the Governors exercised their statutory authority to modify it. *Ibid.* Among other changes, the Governors increased the price of a First-Class postage stamp to 20 cents effective November 1, 1981, but retained three and four-cent discounts for presorted First-Class Mail. This modification action is now being reviewed by the Second Circuit in *Time, Inc.* v. *United States Postal Service*, Nos. 81-4183, *et al.*

3. Petitioner argues, in essence, that because presorted mail was listed as a subclass of First-Class Mail in the DMCS approved by the Governors in 1979, it is entitled to separate consideration for application of the factors in Section 3622(b) (Pet. 4-5). The Postal Reorganization Act, however, simply employs the term "classes"—rather than subclasses or rate categories—and leaves it to the administrative processes of the Commission and the ultimate decision of the Governors to determine which groupings of mail should be treated separately for purposes of applying those factors. In the March 10, 1981 decision challenged by petitioner, the Governors allowed to take effect the Commission's recommendation that presorted First-Class Mail be treated like regular mail, but with discounts to reflect cost savings from presortation. See 39 U.S.C. 3622(b)(6). It is entirely uncertain whether separate application to presorted mail of the other criteria listed in Section 3622(b) would produce any further reduction in the applicable rates. Petitioner has shown no causal connection between the relief it seeks and the putative $600 million two-year cost savings referred to in its petition (Pet. 10). There is thus no reason to review the court of appeals' decision.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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